



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

June 19, 2003

Ms. Belinda R. Perkins  
Assistant General Counsel  
Teacher Retirement System of Texas  
1000 Red River Street  
Austin, Texas 78701-2698

OR2003-4222

Dear Ms. Perkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183002.

The Teacher Retirement System of Texas (the "system") received a request for "the names of the two individuals interviewed for the position of chief investment officer" as well as "copies of resumes of all three individuals who were interviewed . . . and any correspondence that [the system] received on behalf of or regarding these three individuals." You state that you have provided some information to the requestor. You claim that other requested information is excepted from disclosure under sections 552.101, 552.117, and 552.137 of the Government Code. In addition, you notified third party SpencerStuart of the request and of its opportunity to submit comments to this office. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered all claimed exceptions and reviewed the submitted information. We have also considered comments submitted on behalf of the requestor. See Gov't Code § 552.304 (providing for submission of public comments).

Initially, we note that the information submitted as Exhibit D-2 is marked confidential. We note, however, that information is not confidential under the Public Information Act (the "Act") simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a

contract.”); *see also Industrial Found.*, 540 S.W.2d at 677 (governmental agency may not bring information within exception by promulgation of rule; to imply such authority would be to allow agency to circumvent very purpose of predecessor to Act). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement or request specifying otherwise.

We now address SpencerStuart’s arguments. The company asserts that portions of Exhibit D-2 are not responsive to the request because they include information concerning individuals other than the three individuals who were interviewed. Generally speaking, the determination of whether or not information is responsive to a particular request lies with the governmental body that receives the request and has a duty to make a good faith effort to relate a request to information that it holds or to which it has a right of access. *See Open Records Decision No. 561 at 8 (1990)*. When a governmental body submits information to this office, we assume that it does so because it has in good faith concluded that such information is in fact responsive to the request at issue. Furthermore, in this instance information concerning other individuals is part of “correspondence that [the system] received . . . regarding [the] three individuals.” We therefore conclude that all of Exhibit D-2 is responsive to the request.

SpencerStuart also asserts that its information is excepted under section 552.111 of the Government Code. This section excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This section incorporates a deliberative process privilege. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). However, section 552.111 is a discretionary exception. Such exceptions are designed to protect only the interests of governmental bodies rather than third parties and may be raised or waived by a governmental body at its discretion. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475 (Tex. App.—Dallas 1999, no pet.) (noting that section 552.007 provides that governmental body may choose not to raise exception and may voluntarily disclose information that is not confidential by law); *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied) (noting that government agency may waive permissive exception and release information unless release is expressly prohibited by law or information is confidential under law); *Open Records Decision Nos. 663 (1999)* (section 552.111 may be waived by governmental body), 522 at 4 (1989) (discretionary exceptions in general). Because the system has not raised section 552.111, it is inapplicable to the submitted information.

We next address SpencerStuart’s arguments that its information is excepted from disclosure under section 552.110. This section protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. *Id.*<sup>1</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

information was obtained[.]” Gov’t Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having reviewed SpencerStuart’s arguments and the information at issue, we find that the company has failed to establish that any of the specific information at issue meets the definition of a trade secret. *See* ORD 402; *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if it is “simply information as to single or ephemeral events in the conduct of the business” rather than “a process or device for continuous use in the operation of the business”). In addition, we find that SpencerStuart has failed to provide specific factual evidence that release of any of the submitted information would cause it substantial competitive harm. *See* ORD 661 at 5-6. Thus, none of the submitted information may be withheld pursuant to section 552.110.

We now address the system’s arguments. You assert that portions of Exhibit D-1 are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who, prior to a governmental body’s receipt of a request for information, elect under section 552.024 to keep such information confidential. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). In this instance, two of the individuals at issue are system employees who, prior to the system’s receipt of this request, elected to keep their personal information confidential. Thus, we agree that the system must withhold the information it has highlighted as well as additional information that we have marked that concerns these two individuals. In addition, to the extent any of the other individuals discussed in the submitted information are current or former system employees or officials who made timely elections, their information must also be withheld. The system may not withhold such information under section 552.117 for anyone who does not meet these criteria.

We also understand you to assert that the third applicant’s personal telephone numbers are protected by common law privacy. The common law right of privacy, which is encompassed by section 552.101 of the Government Code<sup>2</sup>, protects information that (1) contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). However, this office has

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<sup>2</sup>Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

concluded that in the absence of special circumstances, names, addresses, and telephone numbers are not "intimate" information. *See* Open Records Decisions Nos. 478 (1987), 455 (1987). As you do not claim that special circumstances exist in this instance that would require the protection of this or any of the other individuals at issue, we conclude that none of the submitted information may be withheld under section 552.101 on the basis of common law privacy. *See* Open Records Decision No. 169 at 6-7 (1977) (concluding that "special circumstances" refers to very narrow set of situations in which release of information would likely cause someone to face "an imminent threat of physical danger" and that initial determination of such circumstances must be made by governmental body that receives request).

You also contend that certain information contained in the submitted documents is excepted from disclosure under section 552.137 of the Government Code. This section provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]." We note that section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or website address. You inform us that the individuals at issue have not affirmatively consented to release of their e-mail addresses. Therefore, we agree that the system must withhold all e-mail addresses of members of the public. *See* Gov't Code § 552.137(b).

In summary, information protected by section 552.117 must be withheld to the extent that it relates to any current or former system employee or official who made a timely election under section 552.024. Pursuant to section 552.137, the system must also withhold all e-mail addresses of members of the public. All other information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

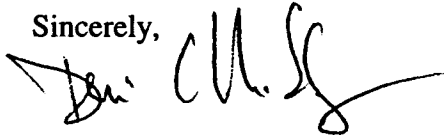
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Den C. McElroy", written over the word "Sincerely,".

Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/sdk

Ref: ID# 183002

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